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IN THE

# Supreme Court of the United States

..... Term 195....

No. 637

JOHN D. MYERS,
*Petitioner,*

vs.

JOHN B. HOLLISTER,
Director,
International Cooperation Administration,
PHILIP M. YOUNG,
Chairman,
and
GEORGE M. MOORE,
FREDERICK J. LAWTON,
Commissioners,
United States Civil Service Commission
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The

# Supreme Court of the United States

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No.

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John D. Myers,
*Petitioner,*

vs.

John B. Hollister,
Director,
International Cooperation Administration,
Philip M. Young,
Chairman,
and
George M. Moore,
Frederick J. Lawton,
Commissioners,
United States Civil Service Commission
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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John D. Myers, petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit (hereinafter referred to as "the Court of Appeals" or "the court below") to review the judgment entered in this cause on September 1, 1955.

## OPINIONS BELOW

The United States District Court for the District of Columbia (hereinafter referred to as the "District Court") dismissed petitioners complaint. The bench opinion of the motions judge does not appear in the reports of the Federal Supplement; however, that opinion and the order of dismissal are reproduced in Appendix A, *infra*.

The majority and dissenting opinions of the Court of Appeals have been reported (226 F2d 346) and are reprinted in Appendix B, *infra*.

## JURISDICTION

The judgment with which this Petition is concerned was entered and recorded in the Court of Appeals on September 1, 1955.

Time for petitioning for review by writ of certiorari was extended until January 20, 1956 by order of the Chief Justice of the United States.

The jurisdiction of this Court to entertain the instant Petition is invoked under 28 USC 1254(1).

## QUESTION PRESENTED

The question presented is whether the reduction-in-personnel proviso in the Mutual Security Act of 1952 impliedly repeals the employment retention rights of qualified preference eligible veterans specified in Sections 2 and 12 of the Veterans Preference Act of 1944, as amended.

## STATUTES INVOLVED

The reduction-in-personnel proviso in the Mutual Security Act of 1952 (hereinafter referred to as "the MSA

proviso") amended Section 504(d) of Title V of Public Law 165, 82nd Congress, 1st Session, approved October 10, 1951 65 Stat. 373, 379:22 USC 1655(d)(1). The text of Section 504(d) as it read prior to amendment (i.e., prior to enactment of the MSA proviso) is reproduced in Appendix C, *infra.*

The MSA proviso itself is found in Section 7(f) of Public Law 400, 82nd Congress, 2nd Session, approved June 20, 1952 66 Stat. 141, 144. The MSA proviso was not codified in Title 5 of USC (wherein are found laws relating to civil service employee retention rights, etc.); instead, the MSA proviso was codified in Title 22 of USC (wherein are found laws concerned with foreign relations); and, it there appeared in 22 USC 1655(d)(2) and (3) until deleted from the current pocket part. The MSA proviso is reproduced in Appendix D, *infra.*

The employment retention rights of all civil service employees, and of preference eligible veterans in particular, are specified in Section 12 of the Veterans Preference Act of 1944, as amended, Act of June 27, 1944, c. 287, 512, 58 Stat. 390; 5 USC 861. This statute (hereinafter referred to as "Section 12" or "5 USC 861") is reproduced in Appendix E, *infra.*

Employment retention rights are also referred to in Section 2 of the Veterans Preference Act of 1944, as amended, Act of June 27, 1944, c. 287, Sec. 2, 58 Stat. 387, amended July 26, 1947, c. 343, Title II, Sec. 205(a), 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; December 27, 1950, c. 1151, Sec. 1, 64 Stat. 1117; July 14, 1952, c. 728, Sec. 1, 66 Stat. 626. This statute (hereinafter referred to as "Section 2" or "5 USC 851", and is reproduced in Appendix F, *infra*) was last amended before the MSA Director undertook to dismiss Mr. Myers on the theory that the MSA proviso impliedly repealed the Veterans Preference Act *pro tanto.*

## STATEMENT

This Petition seeks review of the decision of the Court of Appeals which affirmed the District Court judgment which granted the Government's motion to dismiss. The affirmance was by a divided court.

The Court of Appeals stated the facts as follows:—

> "This case involves the construction of the so-called MSA proviso contained in Section 7(f) of the Mutual Security Act of 1952, 22 USC 1655(d) (1952). The proviso is to the effect that ninety days after the enactment of the Mutual Security Act of 1952 the personnel administering the Act, with certain exceptions not material here, shall be in the aggregate at least five percent less than the number on June 1, 1952: 'Provided further, That after the Director [of Mutual Security] has determined the reduction to be effected in each agency, the determination as to which individual employee shall be retained shall be made by the head of the agency concerned.'
>
> "Plaintiff-appellant was a veteran preference eligible, in the classified competitive civil service, employed by the Mutual Security Agency. He was discharged on September 17, 1952, during the ninety-day period mentioned in the MSA proviso, without regard to the reduction in force procedures prescribed by the Civil Service Commission pursuant to the Veterans Preference Act, 5 USC 861, 863 (1952). His appeal to the Civil Service Commission was dismissed on the grounds that under the MSA proviso his discharge was within the discretionary authority of the head of the employing agency. Plaintiff-appellant then filed this suit in the District Court. He asked that his discharge be set aside and that he be restored to his position. The District Court dismissed the complaint on the basis of the MSA proviso. This appeal followed."

## REASON FOR GRANTING THE WRIT

### I. The Decision of the Court of Appeals, by Disparaging Rights Which Congress Has Consistently Insured to Veterans in the Civil Service, Has Raised Questions of General and Continuing Importance in Federal Law.

The majority opinion of the Court of Appeals introduces confusion and doubt into one area of the law governing the construction of Federal statutes which heretofore had been clear at least so far as concerns statement of principle. Thus, until the court below spoke, it was well settled that implied repeals were not favored. The decision of the Court of Appeals is at variance with the *rationale* of a host of earlier decisions and pronouncements of this Court on this subject.[1]

The specific question in the instant litigation has not been settled by this Court. Of the many reasons which indicate that this particular case and its particular question should be settled in this Court, the three following ones are particularly cogent:—

(a) The importance of the right which the Court of Appeals invalidated affords ample justificaton for this Court to take jurisdiction, for that right represents the

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[1] This rationale is expressed in **Posadas v. National City Bank** (1936) 296 US 497, 503 as follows:— "The cardinal rule is that repeals by implication are not favored. When there are two acts upon the same subject, effect should be given to both if possible." Decisions of this Court to this point are too numerous for citation. Almost the same language appears in **United States v. Borden Co.** (1939) 308 US 188, 199. A recent application of this rule appears in the majority opinion in **Rosenberg v. United States** (1953) 346 US 273, 294-5. This opinion, rendered a year after the enactment of the MSA proviso, reiterates the rule in all its vigor. Likewise it repeats the well-known corollary that the intention to repeal must be "clear and manifest." Despite the timeliness of this decision, the Court of Appeals seemingly has ignored it.

clear, repeated,[2] and unequivocal expression of Congressional policy and it is a right conferred upon hundreds of thousands of our citizens.[3] There is no correspondingly clear statement by the Congress impugning that right, and the result reached by the Court of Appeals rests upon the view of only two of the three judges to whom the case was submitted.

(b) The language in the MSA proviso upon which the implied repeal was found in this case is similar to lan-

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[2] In House Report No. 1289 of the 78th Congress, 2nd Session (reported in US Code Congressional Service for 1944, at page 1154) the House Committee on Post Office and Civil Service in reporting on the legislation which later became the Veterans Preference Act of 1944 had the following to say in Paragraphs 2 and 3 under the heading "General Statement":—

"GENERAL STATEMENT

"It has been the policy of the United States Government since the beginning of the Republic to extend certain benefits to those who have risked their lives in the armed services during wartime. Since shortly after the Civil War, the Congress has provided in various statutes for different forms of preference in governmental employment to war veterans. These statutes have usually been applied under Executive orders and regulations promulgated by the President.

"For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. * * *"

Some of the statutes which give evidence of the long continuing interest of the Congress in this matter are as follows:—

Act of March 3, 1865; 13 Stat 571; Sec. 1754 R. S.
Act of August 15, 1876; 19 Stat. 169
Civil Service Act of January 1, 1883; 22 Stat. 403, 406.
Act of August 23, 1912; 37 Stat. 413.
Census Act of March 3, 1919; 40 Stat. 1293
Veterans Preference Act of June 27, 1944; 5 U.S.C.A.

[3] Approximately one-half of all Civil Service employees are "preference eligible" veterans.

guage which has been used before and it, of course, may be used again by Congress.[4] Therefore, if this Court grants the instant petition it will be able to decide an important issue which will govern other cases involving similar conflict. In fact, the present decision of the Court of Appeals in the instant litigation has been, and is being, relied upon in similar cases now in the District Court.[5]

(c) The need for this Court to guide the federal judiciary in the fundamentals of statutory construction is too apparent to require elaboration. If the instant petition involved nothing beyond a question as to whether the Court of Appeals gave proper effect to the Veterans Preference Act, it would still merit review by this Court for the reasons given in (a) and (b) above; but, the instant litigation involves vastly more—its reach extends to the heart of the problem of implied repeal. This Court has heretofore dealt with this recurring problem.[6] The frequency of that concern is perhaps the best guarantee that there must be many more decisions from this Court on the same vexing problem. The instant petition is a peculiarly suitable vehicle for it provides an intrinsically important as well as a suitably exemplary basis for this Court to further clarify that troublesome topic.

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[4] See Appendix C, *infra*. See also Small Business Act of 1953, Sec. 218(b), 67 Stat. 239, construed in Kerr v. Barnes, *infra*, note 10.

[5] The exact number is not known but government counsel will admit that there are several.

STATUTES

[6] The United States Supreme Court Digest (1949 Ed) under Sec. 229, "Judicial Policy, Necessity of Clear Intent or Irreconcilable Repugnancy," contains three and one-half pages of citations and digests to the proposition that repeals by implication are not favored and that clear intent or positive repugnancy must exist before an implied repeal can properly be found.

## A. THE INTRINSIC JUSTIFICATION

Since the birth of the Republic, our Government has concerned itself with efforts to ameliorate the sacrifices—both voluntary and involuntary—incurred by those who bear arms in its defense. Rights thus founded merit the most painstaking protection by the courts. All legal rights may be theoretically equal in their essence, but a right founded upon a moral obligation of the sovereign is one which partakes of the highest qualities which can inhere in sovereignty. This Court has not hesitated to conserve the fullest measure of rights so founded, and it would be but further evidence of this traditional concern if the instant Petition be allowed.

Without trespassing on the merits of the issue, it can be fairly said that the present decision rests fundamentally on the apparent desire of the court below to give the fullest possible meaning to every word and phrase in the MSA proviso while regarding Section 12 of the Veterans Preference Act as a mere subject for erosive action.

When the Congress enacted the MSA proviso it sought to correct a temporary imbalance. In that preemptory order to reduce personnel the Congress gave no evidence of a desire to suspend or dispense with the particular rights which it has earlier given to preference eligible veterans. The unknown author of one of the five committee reports which dealt with the act which finally produced the MSA proviso may have so intended, but he (or they) failed to even tender language in the proposed legislation adequate to make such intent clear.[7]

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[7] Footnote No. 8 in the majority opinion of the Court of Appeals contains one entirely incorrect statement of fact and except for the qualifying phrase "sofar as we have been advised" it contains another more serious misstatement and creates a false impression as to the legislative history. First, the original draft of the MSA proviso did not remain untouched; it was changed in the Conference Report. Even more important, however, is the fact that there was no report to the Senate

No one can say, now that the second ranking member of the Court of Appeals has agreed with petitioner's position, that the comparative dominance of the two statutes here involved is free of question. Until Judge Prettyman's dissent was entered in this cause, the substance of the Government's position was simply that the Government's reading of the MSA proviso was so obviously correct that there was no room for argument.[8] It can be noted that the Veterans Preference Act is expressly designed to govern in instances where a reduction in civil service personnel must be made. Section 12 suggests no exception.[9] In the face of the specific and absolute declaration of Congressional policy set forth in the Veterans Preference Act, and notwithstanding the acknowledged rule that implied repeals are not favored by the law, the court below found that a preemptory order to reduce personnel engaged in the work of the Mutual Security Program was an order which could be complied with without regard to the Veterans Preference Act. Whether that decision is right or wrong is a question which goes to the merits of this litigation. But it is evident that the issue is one of importance and general federal law—the very kind of problem with which this Court is properly concerned—for the present decision marks the Veterans Preference Act as an inert mass to lie supinely and be eroded away.

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which contained language in any way comparable to that which so impressed the Court of Appeals below. In fact, a study of the legislative history clearly establishes the fact that the Senate was led to believe that the only purpose of the MSA proviso was to effect "some reduction of personel." (*Congressional Record*—82nd Congress, 2nd Session—Volume 98, Part 5 at page 6666, June 5, 1952). But this sort of material, of course, belongs in the brief on the merits.

[8] See Government's brief in the court below.

[9] In pertinent part, Section 2 of the Veterans Preference Act (5 USC 861) states:

"In *any* reduction of personnel in *any* civilian service of *any* Federal agency * * *" (Emphasis added).

Since a specifically declared and long-standing policy of the Congress has been found to be inadequate in the face of the judicial construction of a transitory Congressional order, a problem worthy of the power which this Court alone can exercise is presented. If a statute such as the Veterans Preference Act can be suspended by a construction of another and obviously less significant statute which may, but not must, be found to be inconsistent with it, it behooves this Court to so declare the law and to repudiate the law to the contrary which has so often been announced. This petitioner, of course, does not believe that this Court would reach such a conclusion, and petitioner agrees with the dissenting judge of the Court of Appeals that there was no basis in this case for implied repeal; but, this argument trespasses upon the merits.

## B. THE EXTRINSIC JUSTIFICATION

In the brief which the Government filed in the Court of Appeals, reliance was placed upon an unreported decision of the District Court which had dealt with a problem similar to that involved in the present litigation. That case, in turn, had rested on the District Court's decision in the present litigation.[10] This affords ample proof of the fact that the decision in the present controversy is one which reaches beyond the particular facts in this case. The desire of the Congress to effect savings in the administrative department of the Government is laudable, and such efforts should not be frustrated. But it does not follow that administrators or courts are to

[10] Kerr v. Barnes, Civil Action No. 2406-54 in the District Court, decision not reported in Federal Supplement. See footnote on page 11 of the Government's brief in the Court of Appeals. The propriety of the citation itself is questionable. Thus, the Government cited the case of Kerr v. Barnes as authority for the Court of Appeals notwithstanding the fact that an earlier decision in the Myers litigation was primary authority relied upon in reaching the result in Kerr v. Barnes.

effect such economies at the cost of long established principles which the Congress itself has not seen fit to disavow. Further, there is nothing in the Veterans Preference Act which would in any way have frustrated the obvious purpose of the MSA proviso.

The present litigation, therefore, presents a fundamental problem in statutory construction—one which has already been repeated,[11] and one which may reasonably be expected to recur. It is appropriate therefore, for this Court to address itself to this particular problem in order that the inferior courts of the federal judiciary may know authoritatively whether or not there has been a change in the law respecting implied repeal.

## II. The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court.

The question this litigation presents is of sufficient general importance in federal law to justify the issuance of the writ. A fundamental statute—one *expressly* designed to govern in instances when for any reason there had to be a reduction in civil service personnel—has been held by the Court of Appeals to be inadequate for its announced purpose. This result is supposed to be justified by implication drawn under established rules of statutory construction. There is no decision of this Court which sustains the lower court's view of those rules. In fact, there are decisions of this Court which are applicable to the issues in this litigation that conflict with the decision of the court below.

The Court of Appeals was urged to recognize the many decisions which state that implied repeals are not favored, and which spell out the conditions necessary to a finding of implied repeal. However, the court below relegated to a footnote its acknowledgment that "as a gen-

[11] Footnotes 4 and 10, *supra;* also language in Appendix C.

erality" it was "no doubt correct" that the law does not favor implied repeals. This slight appraisal of the doctrine on which petitioner relies does not square with the views of this Court. Mr. Chief Justice Hughes, speaking for a unanimous Court characterized as "a cardinal principle of construction," the proposition which the court below regards as a mere generality.[12] Curiously enough the majority opinion cites to, and even paraphrases part of, the very paragraph in which the language above quoted from Mr. Chief Justice Hughes is found; but, the paraphrase omits two key concepts and introduces a wholly new concept which is antagonistic to the basic rule. Thus, the majority cited **Borden** as follows:—

> "In a doubtful case the courts should, of course, make every effort to recognize two allegedly conflicting statutes and give effect to the language and intent of both so far as may be. **United States v. Borden Co.**, 308 US 188, 198 (1939)."

By consulting **Borden** at the page cited by the majority, the following language is found:—

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. **United States v. Tynen**, 11 Wall. 88, 92; **Henderson's Tobacco**, 11 Wall. 652, 657; **General Motors Acceptance Corp. v. United States**, 286 US 49, 61, 62. The intention of the legislature to repeal 'must be clear and manifest.' **Red Rock v. Henry**, 106 US 596, 601, 602. It is not sufficient, as was said by Mr. Justice Storey in **Wood v. United States** 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary. There must be 'a positive repugnancy between the provisions of the new law, and those of the

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[12] **United States v. Borden Co.** (Ill-1939) 308 US 188, 198.

old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' See, also, **Posados v. National City Bank**, 296 US 497, 504." (Brackets in original).

It seems obvious to petitioner that the majority's citation of **Borden** is subject to at least three serious criticisms.

(1) It ignores the admonition that it is a *cardinal* principle of statutory interpretation that implied repeals are not favored. It will be remembered that the majority opinion attempts to sweep this categorical into a footnote where it is brushed off as a "generality." When the Supreme Court says that a particular rule of statutory construction is "a cardinal principle", petitioner does not believe that the court below is at liberty to say as to that rule that "The proposition, as a generality, is no doubt correct."

(2) It fails to even note the requirement that the two statutes be on "the same subject" and it fails to show that the MSA proviso and the Veterans Preference Act deal with the same subject matter. The two statutes do *not* deal with the same subject matter. The MSA proviso requires a reduction in force and it specifies who shall effect it. The Veterans Preference Act specifies the relative preference to be given to persons like petitioner when a reduction in force is required. One says when, how much, and by whom; the other says how.

(3) It fails to note that effect must be given to *both* statutes "if possible." Obviously, the decision of the majority gives effect to only one. It is equally obvious, from Judge Prettyman's dissent, that effect can be given to both.

A fourth point could, if necessary be made. What is the source of the qualifying words "In a doubtful case" found in the majority decision and what does that quali-

fication mean? Is the majority confessing that there is a doubt as to whether there is a conflict between the MSA proviso and the Veterans Preference Act? One thing at least is certain, no such language is found in **Borden**; instead, **Borden** specifies that the legislative intent to repeal "must be clear and manifest."

## III. Since No Other Court of Appeals Can Ever Speak on the Problem Here Involved, the Division of That Court in This Case Suggests the Need for Review by This Court.

In view of the fact that the Civil Service Commissioners must be served personally in the District of Columbia, **Blackmar v. Guerre** (La-1952) 342 US 512, 516, and since the courts require appeal to the Civil Service Commission in order to exhaust the administrative remedy, **Akelmacker v. Kelly** (NY-1951) 101 FSup 528,[13] there is no possibility of demonstrating to this Court that there is a conflict in the decisions of two or more courts of appeals on any such case as the instant one. Since there is only one court of appeals which can decide such cases as the present one, petitioner suggests that in lieu of the consideration usually given to conflicting decisions of various courts of appeals,[14] it is both suitable and proper for this Court to consider a conflict within the United

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[13] In **Akelmacker** the civil service employee was told that he could obtain judicial review only after the Civil Service Commission had acted on his appeal, and that he could obtain judicial review in the District of Columbia only.

[14] Rule 19(1)(b) of the Rules of this Court in pertinent part provides:—

". . . reasons which will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same subject matter; . . ."

States Court of Appeals for the District of Columbia Circuit as an independent ground for certiorari in cases which can come before that court only.

## CONCLUSION

Since about half of the Government's civil service employees rely upon the very statute which the Court of Appeals has seen fit to disparage in this litigation, the general importance of the question presented by this Petition can hardly be doubted. And, since other cases have already been decided in reliance on earlier decisions below in this litigation, the continuing importance of the question seems to be equally well established.

The Court of Appeals has misconstrued a decision of this Court which should have led to a contrary conclusion below. Since the question here involved has been decided in a manner inconsistent with an applicable decision of this Court, certiorari should be granted.

There is a sharp division of opinion in the Court of Appeals on the merits of the present case. The strong dissent of Circuit Judge Prettyman is not only correct but unanswered by the majority. This conflict in the court below should be regarded as equivalent to a showing that various courts of appeals are in disagreement due to the fact that the question presented by the present litigation can never be within the jurisdiction of any other court of appeals.

Respectfully submitted,

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## APPENDIX A

### Part I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 5471—53

Myers

v.

Stassen, et al

Washington, D. C.
April 28, 1954

The above entitled cause came before Honorable Edward A. Tamm, District Judge.

*Opinion of the Court*

THE COURT: In the present action the plaintiff, a veteran of World War I, a civil service employee of the Government for some 32 years, sets forth that in September 1952 he was employed in the District of Columbia office of the Mutual Security Agency, and that on or about September 17, 1952 he was discharged from that agency. The plaintiff contends that this discharge was in violation of his rights under the Veterans Preference Act of 1944 and of certain Civil Service rules and regulations which have been promulgated under the terms of the Veterans Preference Act.

The defendant or defendants, the Administrator of the Foreign Operations Administration, within which the Mutual Security Agency is embraced, and the United States Civil Service Commissioners deny that the plaintiff's discharge was an illegal one, but state that it was justified upon the basis of the provisions of Section 504 (d) of Public Law 165 of the 82nd Congress.

The defendants justify the discharge of this plaintiff without regard to or reference to his veteran's preference rights under this specific section of the Public Law quoted: "Provided further that after the director has determined the reduction to be effected in each agency the determination as to which individual employee shall be retained shall be made by the head of the agency concerned."

The question propounded, then, to the Court at this time is whether this specific provision of Public Law 400 does, for the purpose of the reduction of staff in the operations of the Mutual Security Agency, afford to the executives of that agency the legal right to disregard the provisions of the Veterans Preference Act.

There does not seem to be, to this Court, any ambiguity in the right afforded to the director to determine the individual employees who shall be retained. Nevertheless, the Court refers to the Report of the Committee on Foreign Affairs submitted with reference to what became Public Law 400, wherein the Court finds in the discussion of the provisions of the Act this sentence on page 68: "The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program without regard to existing statutes, regulations and procedures for reduction in force."

The Court is of the opinion that Congress having given the right, veterans preference in Civil Service cases, had and has the right to take away those privileges which it has granted.

The Court is of the opinion that in enacting the sentence giving the director the right to determine which employees are to be retained the Congress granted that director the power to act without regard to other acts of Congress or to Civil Service regulations.

The Court believes, then, that it is required in this situation to grant the Government's motion to dismiss this action. The Court, accordingly, grants the Government's motion, which, for practical purposes, constitutes also a denial of the plaintiff's motion for summary judgment.

## APPENDIX A

### Part II

*Order*

This cause having come on for hearing on the defendants' motion to dismiss the complaint and the plaintiff's motion for summary judgment, and the Court having considered the pleadings and memoranda filed herein, including the brief of the American Legion as amicus curiae in support of plaintiff's motion for summary judgment, and having heard arguments of counsel for the plaintiff and defendants, it is this 29th day of April, 1954,

ORDERED that the defendants' motion to dismiss is granted and the plaintiff's motion for summary judgment is denied.

/s/ Edward A. Tamm
Judge

## APPENDIX B

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This case involves the construction of the so-called MSA proviso contained in Section 7(f) of the Mutual Security Act of 1952, 22 U.S.C. § 1655(d) (1952). The proviso is to the effect that ninety days after the enactment of the Mutual Security

Act of 1952 the personnel administering the Act, with certain exceptions not material here, shall be in the aggregate at least five per cent less than the number on June 1, 1952: "Provided further, That after the Director [of Mutual Security] has determined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned."

Plaintiff-appellant was a veteran preference eligible, in the classified competitive civil service, employed by the Mutual Security Agency. He was discharged on September 17, 1952, during the ninety-day period mentioned in the MSA proviso, without regard to the reduction in force procedures prescribed by the Civil Service Commission pursuant to the Veterans Preference Act, 5 U.S.C. §§ 861, 863 (1952). His appeal to the Civil Service Commission was dismissed on the ground that under the MSA proviso his discharge was within the discretionary authority of the head of the employing agency. Plaintiff-appellant then filed this suit in the District Court. He asked that his discharge be set aside and that he be restored to his position. The District Court dismissed the complaint on the basis of the MSA proviso. This appeal followed.

In this court appellant urges that repeals by implication are not favored by the law,[1] that the MSA proviso and the Veterans Preference Act are not incompatible, and that, since the MSA proviso is unambiguous, no regard can be had to its legislative history in order to determine its meaning. That meaning, according to ap-

[1] Citing General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61-62 (1932); Sims v. Rives, 66 App.D.C. 24, 84 F.2d 871 (1936). The proposition, as a generality, is no doubt correct. *Compare* Jordan v. United States, 93 U.S. App.D.C. 65, 207 F.2d 28 (1953), and cases cited *infra* in the present opinion.

pellant, appears plainly on its face to be that the Director of Mutual Security shall determine the reduction to be effected in each agency, and that the head of the agency shall carry out a reduction in force program; but in carrying out that program, he is bound to observe the requirements imposed by the Veterans Preference Act and the rules promulgated under it.

The MSA proviso says that "The determination as to which individual employees shall be retained shall be made by the head of the agency concerned." That statement is quite inconsistent with the result which would have obtained if it had been omitted from the proviso. The regulations of the Civil Service Commission on the subject of reduction in force are extremely complex, and are evidently designed to repose a minimum of power and discretion in agency heads in the administration of reduction in force programs. Most emphatically those regulations do not provide that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned." It is fair to say that they provide, in substance, exactly the contrary. See 5 C.F.R. Part 20. Yet appellant argues that the head of each agency already had power to determine which employees were to be retained in any reduction in force program—subject always to the limitations of the Veterans Preference Act and regulations thereunder. This argument, of course, is unconvincing. If it were well founded, it would reduce the proviso to mere surplusage. But it appears to us to be entirely unfounded, for the reasons just suggested.

In a doubtful case the courts should, of course, make every effort to reconcile two allegedly conflicting statutes and give effect to the language and intent of both so far as may be. *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). But this process cannot be carried to such length as to deprive one or the other of the statutes of

its essential meaning.[2] We think that is appellant's effort here: to deprive the disputed words of any real significance. Before a court accepts that course, it is certainly entitled to seek out—and we think it should seek out—the purpose of the legislation through such extrinsic aids as may be available. See *United States* v. *American Trucking Associations,* 310 U.S. 534, 544 (1940), where the Court repudiated the "literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion." See also *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479 (1943).

Looking, therefore, at the legislative history of the MSA proviso, we find this: The Proviso was drafted by the House Committee on Foreign Relations. That Committee, in its report on the bill which became the Mutual Security Act of 1952, said in explanation of the statutory text:

> "The Mutual Security Act of 1951 reduced the personnel of the Mutual Security Agency by 10 percent. But the MSA is only one of several agencies engaged in carrying out the act. The State Department, the Defense Department, the TCA also come within the scope of its provisions. Hence the committee gave close scrutiny to all the personnel engaged in the administration of the law. It interrogated witnesses and sought the advice of the executive branch on a reduction in numbers. Those paid from local currency are aliens. The local currency constitutes no charge against the United States. Personnel paid from program funds are numerically the largest. To effect a reduction in their numbers, however, ap-

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[2] See United States v. Jordan, 109 F.Supp. 528 (D.C. D.C.), *Affirmed,* 93 U.S.App.D.C. 65, 207 F.2d 28 (1953); Smith v. Day & Zimmerman, 65 F.Supp. 209 (S.D.Iowa 1946); Arenas v. United States, 60 F.Supp. 411, 425 (S.D.Cal. 1945), *affirmed,* 158 F.2d 730 (9th Cir. 1946), *cert. denied,* 331 U.S. 842 (1947).

peared to work undue hardship on the programs. They include such diverse groups as technicians working on Point IV programs and ungraded civilian workers employed in arsenals and Government yards. Many of the latter group are on a daily or hourly pay basis. In the case of technicians a cut-off date would place a heavy burden on TCA. Its personnel strength is still far short of the targets that the Congress has approved.

"The Committee has recommended a 10 percent reduction in military personnel and those paid from administrative funds, with certain exceptions. It is estimated that this provision will result in a reduction of over 1,000 people.

"Unless care were taken in writing this amendment, the last employed would be the first discharged. This was not the primary objective of the amendment. The committee was desirous of eliminating the drones. It therefore gave careful attention to the language of the proviso. In order that the reduction may be carried out without any loss of effectiveness the Director for Mutual Security is to distribute the cut among the various agencies. The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program, without regard to existing statutes, regulations and procedures for reduction in force."[3]

From this history we must conclude that the proviso was intended—in the limited number of cases to which it had application—to give agency heads broad discretion-

[3] H.R.Rep. No. 1922, 82d Cong., 2d Sess. 67-68 (1952). Nothing to the contrary of this statement appears anywhere in the legislative history so far as we have been advised. The bill went to the floor, was debated, went to conference and finally to the White House. Nowhere does there appear any statement or comment contrary to that of the House Committee which had drafted the bill, and the language of the proviso as drafted by that Committee remained untouched in the conference report.

ary power to discharge employees, "without regard to existing statutes, regulations and procedures for reduction in force". We further conclude that in the matter of reductions in force in Federal agencies, contrary to what appellant argues, the Veterans Preference Act occupies the position of a general law and the MSA proviso that of a special law, applying only to one particular reduction in force in one specified agency and not impairing or affecting in any way the rules applicable to reductions in force in other agencies or even in MSA beyond the five per cent reduction in force ordered by Congress in the Mutual Security Act of 1952. As such, the proviso must prevail. *MacEvoy Co.* v. *United States*, 322 U.S. 102 (1944); *Shelton* v. *United States*, 83 U.S. App.D.C. 32, 165 F.2d 241 (1947).

For these reasons, the judgment of the District Court dismissing the complaint must be

*Affirmed.*

PRETTYMAN, *Circuit Judge*, dissenting: I would reverse in this case. The disputed provision in the Mutual Security Act is that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned." I think that provision contemplates a determination by the agency head in accordance with law. It does not repeal existing law on the methods to be pursued in reductions in force, and it does not by the remotest suggestion create an exception to all such existing law. It does not release the agency head from the otherwise valid restrictions imposed by the President, the Congress, or both together.

It is a familiar rule that repeal by implication is found only by reason of necessity. No necessity exists here; the provision can be read with complete sense in conjunction with existing law. If, for example, a statute on some subject should contain a provision that determinations in

disputes arising thereunder should be made by a District Court, that provision would not repeal or create an exception to the Rules of Civil Procedure or to any established principles governing adjudications. Such a statutory provision is merely a designation of the agency to which authority is confided; it is not a prescription of standards or procedure.

Sentences in the Mutual Security Act preceding the quoted provision refer repeatedly to functions to be performed by the Director for Mutual Security. I read the disputed proviso as merely a careful insurance by the draftsman against the idea that the Director should pick the personnel to be released. The simple meaning of the statute, as I read it, is that the Director shall do so-and-so but that when it comes to picking the personnel for release the head of the agency shall do the job. Maybe, as my brethren suggest, the proviso in issue here was unnecessary to accomplish the meaning I attribute to it. But surely it serves the purpose of a precautionary clause and marks the boundaries of the Director's duties in carrying out the ordered reduction in force. Although it may have been unnecessary for the purpose of giving agency heads power to choose the personnel for release, it serves to avoid any suggestion that the agency heads no longer have that power. In that sense the proviso is not "mere surplusage" under my construction; it was the result of careful drafting. Many statutes contain precautionary clauses which are good draftsmanship although unnecessary. A prime example is the Bill of Rights, the first Eight Amendments.

Moreover I think Congress did not mean by this enactment to repeal for these purposes all preferential rights of veterans. I would be surprised, even shocked, if it were shown that Congress had that intent in such an innocent-looking statutory clause. The whole congressional history in this field is contrary to such an intent.

## APPENDIX C

Section 504(d) of the Mutual Security Act of 1951 22 USC 1655(d)(1):

"(d) On and after January 1, 1952, the number of United States citizens employed by the Mutual Security Agency shall be at least 10 per centum less than the number employed by the Economic Cooperation Administration on August 31, 1951: *Provided* That the Director for Mutual Security shall cause studies to be made from time to time for the purpose of determining whether further reductions in personnel are feasible and consistent with the accomplishment of the purposes of this Act."

## APPENDIX D

Section 7(f) of the Mutual Security Act of 1952: 22 USC 1655(d)(2) and (3). [NB. Referred to in the Petition as "the MSA proviso"]:

"Before the period at the end of section 504(d), insert the following: ': *Provided further,* That, ninety days after the enactment of the Mutual Security Act of 1952, the number of civilian employees who are United States citizens, receiving compensation or allowances from the administrative expense appropriations authorized by this Act, employed in the United States and overseas by or assigned to the Mutual Security Agency, or employed by or assigned to the Department of State or the Department of Defense for carrying out programs the appropriations for which are authorized by this Act, and the military personnel assigned to such programs, shall be in the aggregate at least 5 per centum less than the number so employed or assigned on June 1, 1952, except for such personnel of the Department of Defense engaged in the manufacturing, repair, rehabilitation, packing, handling, crating, or delivery of materiel: *Provided further,* That after the Director has deter-

mined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned.'"

## APPENDIX E

Section 12 of the Veterans Preference Act of 1944, as amended; 5 USCA 861:

"*Reduction in personnel; considerations affecting release.* In any reduction of personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when an agency is replaced by some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

## APPENDIX F

**Section 2 of the Veterans Preference Act of 1944, as amended; 5 USC 851:—**

## CHAPTER 17.—PREFERENCE OF VETERANS IN GOVERNMENT EMPLOYMENT

### §851. Persons entitled to federal employment preferences

In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or Department of the Air Force or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or during the period specified in clause (6)

of this section, and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; (5) mothers of deceased ex-servicemen or ex-servicewomen who lost their lives, under honorable conditions while on active duty in any branch of the Armed Forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or during the period specified in clause (6) of this section, or of service-connected permanently and totally disabled ex-servicemen or ex-servicewomen who were separated from such Armed Forces under honorable conditions if—

(a) the father is totally and permanently disabled, or

(B) the mother was widowed, divorced, or separated from the father and—

(1) has not remarried, or

(2) has remarried but (i) her husband is totally and permanently disabled or (ii) she is divorced or legally separated from her husband or such husband is dead at the time preference is claimed; and

(6) those ex-service men and women who have served on active duty in any branch of the Armed Forces of the United States during the period beginning April 28, 1952, and ending July 1, 1955 (the period after the termination of the state of war between the United States and the Government of Japan during which persons may be inducted under existing law for training and service in the Armed Forces), and have been separated from such

Armed Forces under honorable conditions. As amended July 26, 1947, c. 343, Title II, § 205(a), Title III, § 305(a), 61 Stat. 501, 508; Jan. 19, 1948, c. 1, § 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; Aug. 26, 1949, c. 513, 63 Stat. 666; Dec. 27, 1950, c. 1151, § 1, 64 Stat. 1117; July 14, 1952, c. 728, § 1, 66 Stat. 626.

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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 637

JOHN D. MYERS, PETITIONER

*v.*

JOHN B. HOLLISTER, DIRECTOR, INTERNATIONAL COOPERATION ADMINISTRATION; PHILIP M. YOUNG, CHAIRMAN, AND GEORGE M. MOORE, FREDERICK J. LAWTON, COMMISSIONERS, UNITED STATES CIVIL SERVICE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the United States District Court for the District of Columbia (Pet. App. 16-18; R. 11-13) is not reported. The majority and dissenting opinions of the Court of Appeals for the Dis-

trict of Columbia Circuit (Pet. App. 18-24; R. 14-21) are reported at 226 F. 2d 346.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 22). The time for filing a petition for a writ of certiorari was successively extended to January 27, 1956, by an order of the Chief Justice dated November 30, 1955, by an order of Mr. Justice Reed dated December 29, 1955, and by orders of the Chief Justice dated January 10, 1956 and January 20, 1956. The petition for a writ of certiorari was filed on January 25, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the usual civil service rules governing reductions in force were applicable to the special five percent reduction prescribed by Section 7(f) of the Mutual Security Act of 1952, in view of the proviso in that section that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned".

STATUTES INVOLVED

Section 7(f) of the Mutual Security Act of 1952, 66 Stat. 141, 144, 22 U.S.C. 1655 (d), provides in pertinent part:

> * * * *Provided further,* That, ninety days after the enactment of the Mutual Security Act of 1952 [June 20, 1952], the number of civilian employees who are United

States citizens, receiving compensation or allowances from the administrative expense appropriations authorized by this Act, employed in the United States and overseas by or assigned to the Mutual Security Agency, or employed by or assigned to the Department of State or the Department of Defense for carrying out programs the appropriations for which are authorized by this Act, and the military personnel assigned to such programs, shall be in the aggregate at least 5 per centum less than the number so employed or assigned on June 1, 1952 * * *: *Provided further,* That after the Director has determined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned.

2. Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, 5 U.S.C. 861, provides as follows:

Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Comission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That pref-

erence employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

STATEMENT

Petitioner, a former employee of the Mutual Security Agency, has a veteran's preference status in the classified competitive civil service (R. 5-6). On November 27, 1953, he brought suit in the United States District Court for the District of Columbia, claiming that his discharge by the Mutual Security Agency in September 1952 was in violation of his rights under the Veterans' Preference Act of 1944 (R. 5-8). The District Court dismissed his complaint for failure to state a claim upon which relief could be granted (Pet. Ap. 18; R. 9-10), and the Court of Appeals af-

firmed by a divided vote (Pet. App. 18-24; R. 14-21).

The circumstances relating to petitioner's discharge are not in dispute and may be summarized as follows:

On June 20, 1952, Congress passed the Mutual Security Act of 1952, Sec. 7(f) of which (*supra*, pp. 2-3) compelled the Director of the Mutual Security Agency to reduce the number of persons employed in connection with that agency's program to at least five percent below the number employed on June 1, 1952. The Act specified that this reduction was to be effected within ninety days from its enactment, *i.e.*, by September 18, 1952. In compliance with this Congressional directive and pursuant to what he conceived to be his authority under the final sentence of Section 7(f) (*supra*, p. 3), the Mutual Security Director selected petitioner as one of those whose employment should be terminated. Consequently, petitioner was discharged on September 17, 1952, without regard to the reduction in force procedures prescribed by the Civil Service Commission pursuant to the Veterans' Preference Act of 1944. (R. 5-6.)

Thereupon petitioner filed an appeal to the Civil Service Commission alleging that his discharge had been illegal because it was not in accord with civil service regulations established pursuant to the Veterans' Preference Act (R. 6-7). The Commission sustained the action of the agency director and dismissed petitioner's appeal (R. 7) on the ground that his discharge was effected under the

terms of the Mutual Security Act, that the Act gave the director discretion to select those who would be retained after the prescribed reduction in force, and that the Commission's regulations and the Veterans' Preference Act were thus inapplicable to petitioner's dismissal.

Petitioner then brought this action in the District Court seeking to have his discharge set aside and to obtain reinstatement (R. 5-8). The District Court dismissed the complaint (Pet. App. 18; R. 9-10) rejecting the contention that there was "any ambiguity in the right afforded to the director to determine the individual employees who shall be retained" (Pet. App. 17; R. 12).

On appeal, the Court of Appeals affirmed (per Washington, J.), holding that the language of the Mutual Security Act established a procedure which was inconsistent with the Veterans' Preference Act so that the latter Act was here inapplicable (Pet. App. 18-23; R. 14-19). The Court of Appeals added that if there were any doubt, recourse should be made to the legislative history of the Mutual Security Act which revealed a clear Congressional purpose that the director would have discretion in selecting the personnel to be discharged, without reference to pre-existing statutes, regulations, or procedures for reduction in force (Pet. App. 20-23; R. 17-19). Judge Prettyman dissented on the ground that, as he read the language of the Act, Congress intended the director to bring about the prescribed reduction in conformity with then existing procedures, including

those adopted pursuant to the Veterans' Preference Act, rather than by exercising his own discretion (Pet. App. 23-24; R. 19-21).

ARGUMENT

The Director of Mutual Security, the Civil Service Commission, the District Court and the Court of Appeals have all held that the special five percent reduction in force ordered by Congress in the Mutual Security Act of 1952 did not have to be made in conformity with the veterans' preference regulations and other Civil Service Commission requirements, in view of the specific proviso of Section 7(f) of the Act (*supra*, pp. 2-3) that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned". That administrative decision, concurred in by both courts below, is correct, and there is no merit to petitioner's contention that this holding involved a misapplication of accepted principles of statutory construction. Furthermore, the question here presented has no general or present importance, depending upon the particular language of an Act which was operative only for a short period in 1952. Thus there is no occasion for review by this Court.

1. Petitioner's contention (Pet. 5-7) that he could be discharged only in accordance with the reduction in force regulations of the Civil Service Commission, even under this special statutory reduction program, simply ignores the express language of Section 7(f) of the Mutual Security Act (*supra*, pp. 2-3). Congress recognized that the

extraordinary forced reduction in personnel ordered in the Act might well impair the operations of this important agency, if the traditional reduction procedures were applied. Therefore, in order to permit the retention of the most valuable employees, regardless of their seniority or preferences, the usual methods were temporarily suspended for this particular agency, the Act providing that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned".

The Veterans' Preference Act, and the Civil Service Commission regulations promulgated thereunder, leave virtually no choice to the head of an agency "as to which individual employees shall be retained" in effecting a reduction in force, since the regulations rigorously govern the determination, once a reduction in force is decided upon. 12 F. R. 2849, 5 C.F.R. part 20; see *Elder* v. *Brannan*, 341 U.S. 277. As the court below pointed out, these regulations are "designed to repose a minimum of power and discretion in agency heads" (Pet. App. 20; R. 16) in selecting those who will be retained. Furthermore, in applying the Commission's regulations, that "determination" amounts to nothing more than a mechanical ordering of the priority and seniority of all employees involved according to a predetermined formula. If Congress had concluded that the agency head should merely administer the Commission's regulations, as petitioner argues (Pet. 13), it seems extremely unlikely that the Act would provide, as

it does, that "the determination" shall be made by the agency head.

Any possible doubt as to the meaning of the critical language is totally eliminated by the legislative history of the Act. The House Committee on Foreign Relations, which drafted this part of the Act, stated in its report (H. Rep. No. 1922, 82d Cong., 2d Sess. p. 68):[1]

> Unless care were taken in writing this amendment, the last employed would be the first discharged. This was not the primary objective of the amendment. The committee was desirous of eliminating the drones. It therefore gave careful attention to the language of the proviso. In order that the reduction may be carried out without any loss of effectiveness the Director for Mutual Security is to distribute the cut among the various agencies. The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program, *without regard to existing statutes, regulations and procedures for reduction in force.* [Emphasis added.]

We have been unable to find any statement in the Senate or Conference Committee reports or in the floor debates relating to the proposed legislation which is in any way at odds with this interpretation.

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[1] Addtional supporting statements from the Committee Report are included in the opinion of the Court of Appeals below (Pet. App. 21-22, R. 17-18).

2. Petitioner urges that the decision of the Court of Appeals conflicts with numerous rulings of this Court that statutory repeals by implication are not favored (Pet. 11-14). However, this is not in any sense an instance of statutory repeal, by implication or otherwise; rather, the Mutual Security Act of 1952 established a limited temporary exception from the statutes and regulations governing reductions in force, which otherwise remain in full force and operation. The exception was limited in time to ninety days and in scope to federal employees involved in the Mutual Security Agency program. During the ninety days the Act affected only that particular group of employees, and after the ninety days it had no further effect. In enacting such special limited or temporary exceptions, it is not at all unusual for Congress to omit references by name to outstanding legislation that may be affected for a short time or in a small percent of cases. See *e.g.*, Department of State Appropriation Act of 1947, 60 Stat. 446, 458; Department of State Appropriation Act of 1951, Sec. 1213, 64 Stat. 768; Department of Commerce Appropriation Act of 1952, Sec. 304, 65 Stat. 586, 594.

Moreover, even if this were to be considered a case of statutory repeal by implication, the Court of Appeals recognized and applied the rule of construction established by this Court. Both the majority and dissenting opinions (Pet. App. 19, 23; R. 15-16, 19-20) point to the rule that repeals by implication are avoided were possible; the difference between the opinions is based on a variance

in the judges' interpretations of the Act's provision that "the determination * * * shall be made by the head of the agency concerned". The majority, on the one hand, concluded that the phrase meant that he shall make that determination "within his discretion" and that it was therefore incompatible with the Veterans Preference Act procedures. The dissenting judge, on the other hand, interpreted the phrase to mean that he shall make that determination in accordance with existing procedures (but see *supra*, pp. 7-10), so that he found no conflict with the Veterans' Preference Act. Thus the decision below turns on the particular language of this special Act and not upon the general rule of construction to be applied. This is emphasized by the numerous decisions of this same Court of Appeals that have applied the recognized principle, which petitioner urges as a basis for certiorari.[2] See *e.g.*, *Sims* v. *Rives*, 84 F. 2d 871 (C.A.D.C.), certiorari denied, 298 U. S. 682; *Ritholz* v. *March*, 105 F. 2d 937 (C.A.D.C.).

3. The decision below has no general significance because it depends on the particular language of this special Act and because the pertinent statutory provision was operative for a very short period

[2] Petitioner also argues that further review is required because of the importance of veterans' rights generally (Pet. 8-9). Certainly the great multitude of cases relating to various veterans' benefits militates against review by this Court of every such action. Similarly, it would be impractical for this Court to review every non-unanimous decision by the Court of Appeals for the District of Columbia Circuit in cases which must be brought in that Circuit, as petitioner suggests (Pet. 14-15).

more than three years ago. At most, approximately 1,000 federal employees were affected during that ninety day interval. See H. Rep. No. 1922, 82d Cong., 2d Sess. p. 67. Our review of the docket indicates that not one other suit of this type has been filed in the District Court, and any new suits brought at this time would be barred by laches. Cf. *Norris* v. *United States*, 257 U.S. 77; *Grasse* v. *Snyder*, 192 F. 2d 35 (C.A.D.C.). Petitioner contends that the statutory phrase involved here is commonly used by Congress, but he is able to suggest only one other piece of legislation where the language was at all similar, *i.e.* Small Business Act of 1953, Sec. 218(b), 67 Stat. 232, 239, 15 U.S.C. (1952 ed., Supp. II) 647(b).[3]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*
WARREN E. BURGER,
*Assistant Attorney General.*
MELVIN RICHTER,
RICHARD M. MARKUS,
*Attorneys.*

FEBRUARY 1956.

[3] That Act provides: "The President may also provide for such transfers of records, property, and personnel from the Small Defense Plants Administration, during the period of its liquidation, as he considers appropriate to assist the Small Business Administration in carrying out its functions under this title."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 [illegible]

In The

# Supreme Court of the United States

October Term 1955

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No. 637

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John D. Myers,
*Petitioner,*

vs.

John B. Hollister,
Director,
International Cooperation Administration,
Philip M. Young,
Chairman,
and
George M. Moore,
Frederick J. Lawton,
Commissioners,
United States Civil Service Commission
*Respondents.*

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## PETITION FOR RECONSIDERATION TO ALLOW TIME FOR SIMILAR CASES TO REACH THIS COURT

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Petitioner asks that the present Petition for Reconsideration be held in inactive status until similar cases now in the courts below can be presented here. If this Court will thus retain jurisdiction over the present case, it will soon become evident to this Court that the question presented by this litigation is of continuing and general importance in Federal law.

There are at least three cases now in the lower courts which are similar to the present litigation. Two are in the Court of Appeals (see note 10, page 10, of the Petition), and one is in the District Court. The one in the District Court (**Moses v. Dulles,** cited on page 9 of Petitioner's "Reply Brief" herein) is legally indistinguishable from the present case. Although the statute in **Moses v. Dulles** was enacted in 1953 while the statute in the present case was enacted in 1952, the language is substantially identical in both instances. The repeated use by Congress of the same statutory language is proof of the continuing legal importance of that language.

It would be manifestly unfair for the present Petitioner to fail in his plea for relief at this time only to have others at a subsequent time prevail upon facts which are legally indistinguishable. To avoid such an unjust result this Court need only grant the present request.

Relief of a nature analogous to that now requested was provided by this Court in **Stone v. White** (1st Cir.—1937) 301 US 532. In that case, certiorari was granted long after the original petition was denied, 296 US 596. It is true that in **White v. Stone** this Court granted certiorari (by allowing a "motion for leave") after an inter-circuit conflict developed. It is equally true, however, that inter-circuit conflict is not a prerequisite to certiorari. Thus, after certiorari was denied in **Paramount Corp. v. Tri-Ergon Corp.** on October 8, 1934, 293 US 587, the brief for reconsideration made it clear that inter-circuit conflict was not to be expected in that case; and, on November 5, 1934, certiorari was granted in that case, 293 US 528.

Possibly this Court will wish to grant certiorari in this case at the present time, for it may be that the Reply Brief herein filed with the Clerk (which reached the Court after the present case had been taken into confer-

ence) has not yet received the full consideration of the Court.

Respectfully submitted,

CHARLES F. O'NEALL
*Counsel for Petitioner*
1625 K Street, N. W.
Washington 6, D. C.

CERTIFICATION: Counsel, by his signature hereto, certifies that this Petition for Reconsideration is filed in good faith and not for purposes of delay.

CHARLES F. O'NEALL

No. 4

In the Supreme Court of the United States

OCTOBER TERM, 1956

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JOHN H. HARRISON,

*Petitioner*,

v.

STATE OF ALABAMA,

*Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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BRIEF OF PETITIONER

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Press of Byron S. Adams, Washington, D. C.

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IN THE

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OCTOBER TERM, 1955

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No. 637

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JOHN D. MYERS, *Petitioner*

v.

JOHN B. HOLLISTER, DIRECTOR, International Cooperation Administration, PHILIP M. YOUNG, CHAIRMAN AND GEORGE M. MOORE, FREDERICK J. LAWTON, COMMISSIONERS, United States Civil Service Commission, *Respondents*

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## BRIEF FOR THE AMICUS CURIAE

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### INTEREST OF THE AMICUS CURIAE

The American Legion has a deep interest in the provisions of the Veterans' Preference Act of 1944, as amended, because that statute was enacted with the unqualified endorsement of The American Legion and, in fact, The American Legion itself was instrumental in the drafting of the language of that statute.

The American Legion was created by the Act of Congress, approved September 16, 1919 (36 U.S.C. 41-51). The American Legion today has approximately three million members, each of whom has served on active duty in the Armed Forces of the United States during periods of hostility. Ever since its creation The American Legion has been repeatedly invited by the Congress to appear before its various Committees in both the House and the Senate to testify on matters concerning the interest and welfare of veterans.

The Congress has, through its appropriate Committees, never failed to invite The American Legion to testify on any legislation which concerned the rights of veterans. It would be strange indeed if the Congress were to ignore or fail to avail itself of the advice and assistance of The American Legion, for the Congress itself created The American Legion, knows its purpose, and is fully aware of the responsible control which the extensive membership of The American Legion exercises over its National Officers.

The American Legion's deep concern with the present litigation arises from the fact that the Court below has invalidated a key provision found in Sections 2 and 12 of the Veterans' Preference Act of 1944, as amended. This invalidation is said to rest on an implied repeal. The statute which is said to effect that implied repeal (the Mutual Security Act of 1952) was a statute on which neither The American Legion nor any other veterans' organization was invited to testify, for it bears no relation to veterans' rights. Even leaving aside the well-known principles governing implied repeals, it seems to The American Legion that any one who would contend that the Congress impliedly repealed a fundamental provision of the Veterans Pref-

erence Act in a statute which apparently had no relation to veterans' affairs must necessarily assume a heavy burden. That burden can fairly be said to include with it the assumption that Congress was guilty of concealment, (which we do not believe) for as the legislative history of the Congress shows since the date of the creation of The American Legion, the Committees of the Congress have always welcomed the counsel, advice, and recommendations of The American Legion and other veterans organizations on any matter of concern to their members.

For the foregoing reasons, The American Legion is deeply interested in the question which is tendered to this Court by the Petition filed herein. The American Legion believes the decision of the Court below is in error which unless corrected will exercise an adverse effect upon all future judicial considerations of the Veterans' Preference Act.

The American Legion is not less interested in this legislation simply because the Petitioner has long been a member of The American Legion, but for reasons herein expressed, the interest of The American Legion goes beyond personal considerations.

## STATEMENT

The American Legion believes it is necessary to supplement the "Statement" found in the Petition. We take no issue with anything found in Petitioner's statement, but we feel that there is need for an elaboration upon the statement to insure that *all* of the *relevant* facts will be submitted to the Court. The American Legion is convinced that a review of the legislative history of the statutes involved is necessary to appreci-

ate the importance of the question now tendered to this Court.

Petitioner was plaintiff in the District Court. His complaint alleged that he was unlawfully separated from the Mutual Security Agency on September 17, 1952. Plaintiff claimed the benefits specified for preference eligibles in Sections 2 and 12 of the Veterans' Preference Act. Plaintiff alleged that the MSA Director had ordered his discharge in a reduction-in-force without regard to the Veterans' Preference Act on the theory that it was impliedly repealed by the MSA proviso. The question was, thus, squarely presented: did the MSA proviso impliedly repeal, *pro tanto,* Sections 2 and 12 of the Veterans' Preference Act?

In pertinent part, Section 2, of the Veterans' Preference Act, reads as follows:

> ". . . (I)n retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary . . . preference shall be given to . . . (4) those ex-Servicemen and women who have served on active duty in any branch of the Armed Forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized) and have been separated therefrom under Honorable Conditions; . . ." (5 USC 851)

In pertinent part, Section 12 of the Veterans' Preference Act, reads as follows:

> "In any reduction in personnel in any civilian service of any Federal Agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military prefer-

> ence, length of service, and efficiency ratings; Provided, . . . Provided further, That preference employees whose efficiency ratings are good or better shall be retained in preference to all other competing employees . . ." (5 USC 861)

Neither the MSA Director, nor the Civil Service Commission contended that the plaintiff below was not entitled to the maximum protection that the Veterans' Preference Act could afford. Their response to the complaint, however, was a motion for summary judgment based on the contention that the MSA proviso impliedly repealed the Veterans' Preference Act. In pertinent part, the MSA proviso reads as follows:

> ". . . (N)inety days after the enactment of the Mutual Security Act of 1952, the number of civilian employees . . . receiving compensation or allowance from . . . appropriations authorized by this Act, employed . . . by or assigned to the Mutual Security Agency, or employed by or assigned to the Department of State or the Department of Defense for carrying out programs . . . which are authorized by this Act, and the military personnel assigned to such programs, shall be in the aggregate at least 5 per centum less than the number so employed or assigned on June 1, 1952 . . . Provided further, that after the (MSA) Director has determined the reduction to be effected in each Agency, the determination as to which individual employees shall be retained shall be made by the head of the Agency concerned."

The Government relied on three paragraphs in House Report No. 1922 on pages 67-68 in support of their contention that the above-quoted MSA proviso impliedly repealed the Veterans' Preference Act. That language is quoted in full in the majority opinion of

the Court of Appeals. (See Petition, Appendix B, pages 21, 22)

House Report No. 1922 was one of two reports on the MSA legislation submitted to the House. No formal action was taken by the House, so far as concerns House Report No. 1922. On May 12, 1955, Congressman Richards submitted House Report No. 1922 to the House,[1] and the Bill covered by that report (HR 7005) was referred to the Committee of the Whole House.

On May 21, 1952, the Committee of the Whole House began consideration of HR 7005 (which was later enacted as the Mutual Security Act of 1952). Mr. Richards opened the presentation of the arguments in favor of the legislation[2] and in the early part of a lengthy presentation he made the following *oral* statement to the Committee of the Whole House:

> "SUMMARY OF CHANGES IN BILL MADE BY COMMITTEE
>
> "Now we come to the Bill before us. The thorough study of HR 7005 made by the Committee is reflected in the more than 20 amendments made in the text of the Bill as reported. To simplify consideration the Committee amendments were consolidated into one new text, so I wish to enumerate the principal ones for the information of the House. They are: (p. 5645)
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> * * * * * *

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[1] Congressional Record (82nd Congress, 2nd Session) Volume 98, Part 4, p. 5080.

[2] Op. cit., Vol. 98, Part 5, p. 5644 (May 21, 1952).

"Section 7:

"Required a 10 per cent reduction—based on January 1, 1952 personnel—of personnel other than blue-collar workers and technical consultants." (p. 5646)

It is obvious from the above that no one can conclude from Mr. Richards' statement that there was imbedded in the proposed reduction in force a plan to repeal or suspend the Veterans' Preference Act.

During the same initial presentation to the Committee of the Whole House, Congressman Richards yielded the floor to Mr. Ribicoff, who also spoke on behalf of the Bill.[3] Mr. Ribicoff, in turn, undertook to summarize to the Committee of the Whole House the salient provisions of the Bill as *he* understood the legislation. Out of his lengthy presentation, he devoted but two (2) sentences to the MSA proviso. His comments were in these words:

"Within 90 days of the enactment of this bill, the total number of United States citizens working on the program must be reduced at least 10 per cent below the January 1, 1952 figure. It is estimated that over 1,000 employees will be affected." (p. 5658)

Again, during the same initial presentation to the Committee of the Whole House, Congressman Richards yielded the floor to Mrs. Kelly[4] and Mrs. Kelly, in turn, gave her summary of the principal features of the Bill. She devoted one sentence to the MSA proviso. The full text of her comments on the MSA proviso are as follows:

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[3] Ibid, p. 5654 (May 21, 1952).

[4] Ibid, page 5673 (May 21, 1952).

> "Required by July 1, 1952, a 10% reduction—based on January 1, 1952, personnel—of personnel other than blue-collar workers and technical consultants." (p. 5675)

We pause in the statement of the legislative history to suggest that no logical mind can conclude that the Committee of the Whole House was properly apprised by any of the three principal speakers on behalf of the Bill of the "fact" that the MSA proviso was intended to repeal the Veterans' Preference Act, and, if the members of the House had consulted the text of House Report No. 1922 they would doubtless have turned to Appendix IV (beginning on Page 101) for the "Section-by-Section analysis." If they did so, they would have found the following, and only the following as an explanation of the MSA proviso:

> "Section 7(d).—This section requires a *further* reduction in personnel. Within 90 days of the enactment of this bill the total number of United States citizens engaged in the Mutual Security Program must be reduced at least 10 per cent below the January 1, 1952 level of employment. Excepted from this provision are, (a) Defense Department personnel engaged in the manufacturing, repair, rehabilitation, packing, handling, crating, or delivery of material, and, (b) civilian employees not paid from administrative expense appropriations for the Mutual Security Program." (Italics added)

A "further" reduction in personnel? Does this not then refer to the prior legislative order to reduce personnel? Would not the normal reader assume that a "further" reduction would, in the absence of explicit warning, be upon the same basic terms and conditions as the earlier one? The reduction in personnel which

had been required by Congress in the Mutual Security Act of 1951 (for text see Appellant's brief, page 6) could not possibly have been construed, even by resort to doctrines of the decision of the court below, as repealing the Veterans' Preference Act. In fact, Congress had never exempted any agency head from the requirements imposed by the Veterans' Preference Act, and it is fantastic to assume that a Congressman would realize, from the foregoing, that he was being asked to do so. Nay,—all that was proposed was a "further" reduction in personnel—not a reduction of personnel at the whim (or discretion) of the three department heads. To read the foregoing summaries in any other way is to impute fraud to their authors.

The second installment of the report to the Committee of the Whole House on the bill here under discussion occurred on May 22, 1952, and again the discussion of the report was opened by Congressman Richards,[5] and no where in the second period devoted to a consideration of the bill was there any reference to the MSA proviso.

On the third day of consideration of the bill by the Committee of the Whole House on May 23, 1952, Congressman Richards again opened the discussion.[6] On this occasion, that portion of the bill wherein the MSA proviso itself was found was submitted for consideration. The MSA proviso itself represents approximately one-quarter (¼) of one column out of slightly more than five and one-half (5½) columns of text as reported in the Congressional Record.[7] There were 13 separate

[5] Ibid, at p. 5805.

[6] Ibid, at pp. 5905-5906.

[7] Ibid, at pp. 5905-5907.

amendments offered to this portion of the bill by friend and foe alike[8] and, not one of those amendments related to the MSA proviso and not one word was mentioned respecting the MSA proviso in any of the discussions relating to that portion of the bill wherein it was found.

It is apparent to anyone that will read the legislative history of the bill that the Committee of the Whole House was interested in issues of world-wide importance, matters relating to this Nation's security. There was no thought at any time, of amending the Veterans' Preference Act by enacting that bill. Thus, shortly before the bill was approved by the Committee of the Whole House (a few minutes later the bill was approved by the House as such) the manager of the bill summed up what he called "the real issues." A fair sample of that summing up by Congressman Richards is given in the following excerpt:

> "Mr. Richards. Mr. Chairman, before we take final action on this bill, I want to call the attention of the Members to the issues involved and say that I expect to demand two (2) roll call votes in addition to a roll call on passage of the bill.
>
> * * * * * *
>
> "The real issue before us is to decide what course is best for our Country. I give full faith and credit to the honesty of purpose, the sincerity and patriotism of every man and woman in this House and I have the fullest respect for the views of those with whom I have differed in voting on amendments offered to this Bill today. This Mutual Security Bill is so vital a measure that on our judgment today depends an issue which will affect, not only our children but our children's children

[8] Ibid, at pp. 5908-5911.

and their grandchildren. We are all concerned, and justly so, about the cost of the Mutual Security Program in terms of the strains they make on the economy and the stability of the United States, but, in weighing all the facts which confront us, I sincerely believe that when most of us search deep down in our hearts, we will realize beyond doubt that this is a premium we must pay to insure the future of our children and our Country."

It is earnestly submitted that it is utterly inappropriate to assume that legislators who are trying to solve problems of that magnitude should be presumed to have intended, by a curiously restrained nicety of language in a minor part of the Bill, to have repealed benefits which had been given to some of the very men who had previously risked their very lives to save the Nation.

The legislative history in the House is incapable of supporting the theory of the decision of the court below. But, even more opposed is the legislative history in the Senate. The Senate version was initially reported to the Senate by the Foreign Relations Committee on April 30, 1952.[9] This Committee report (S. Rept. 1575) contained no proposal for a reduction in personnel, and *a fortiori* contained no comments in any way comparable to those quoted by the majority opinion below from House Report No. 1922.

By vote on May 5, 1952, the Senate re-referred the Bill to the Committee on Armed Services.[10] On May 15, 1952, the Armed Services Committee reported the Bill favorably.[11] This Committee report (S. Rept.

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[9] Op. cit., Volume 98, Part 4, p. 4640.

[10] Ibid, at p. 4774.

[11] Ibid, Vol. 98, Part 4, p. 5192.

1409) contained no proposal for a reduction in personnel, and *a fortarari* contained no comments in any way comparable to those quoted by the court below from House Report No. 1922.

The Senate deliberations on the Bill are reported at pages 5931-5957, 6007-6031, 6058, 6088-6158.[12] The Senate enacted its own version of the bill as a substitute for the legislation previously enacted by the House.[13]

When the House was informed of the action taken by the Senate as reported above, the House refused to agree and a Conference Committee was appointed on May 29, 1952.[14]

When the Senate was advised of the House action, Senator Connally asked that a Conference Committee be appointed to represent the Senate, and this motion was agreed to on May 23, 1955.[15]

The report of the Conference Committee (House Report 2031) was submitted to the House on June 4, 1952 and ordered to be printed.[16]

The Conference Report was submitted to the Senate on June 6, 1952 by Senator Connally.[17]

On June 5, 1953, the Conference Report was called up before the House by Congressman Richards and

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[12] Op. cit., Vol. 98, Part 5, Dates concerned, May 26, May 27, May 28, 1952.

[13] Ibid, at p. 6158 (May 28, 1952).

[14] Ibid, at p. 6259.

[15] Ibid, at p. 6276.

[16] Ibid, at p. 6576.

[17] Ibid, at p. 6735.

without objection the statement of the Managers on the part of the House was read in lieu of the report.[18] The Report, which (as noted) was not read to the House, included the MSA proviso as it was finally enacted. The "Statement" of the Managers on the part of the House covers approximately two and two-thirds (2-2/3) pages of the Congressional Record,[19] and the portion deemed pertinent at this time reads as follows:

"STATEMENT

"The Managers on the part of the House at the Conference on disagreeing votes of the two Houses on the amendment of the Senate to the Bill (H.R. 7005) to amend the Mutual Security Act of 1951, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying Conference Report: (p. 6659)

* * * * * *

REDUCTION IN PERSONNEL—SECTION 7(f)

"The House Bill provided for a 10 per cent reduction from the level of January 1, 1952, in personnel engaged in carrying out the United States program. The Senate amendment contained no such provision. The conference agreement changes the date on which the reduction is to be based to June 1, 1952, and provides for a 5 per cent reduction.

"The Committee of conference believes that this action is necessary to insure that adequate personnel will be provided to carry out programs in countries where agreements are just being completed preparatory to beginning operations. It should be noted that the reduction provided for in

[18] Ibid, at p. 6655.

[19] Ibid, at pp. 6659-6662 (June 5, 1952).

this section applies to personnel employed by the Departments of State and Defense and the Mutual Security Agency.

"Point IV Program activities are carried out through participating agencies as well as the Department of State's Technical Cooperation Administration. These agencies maintain substantial staffs in Washington as well as the TCA headquarters. These agencies should take steps to reduce their staffs. It is the intent of the committee of conference that all staffs in Washington concerned with Point IV should be brought to reasonable levels. The committee of conference expects the Administrator of the Technical Cooperation to see that this is achieved." (p. 6660)

As before, the principal argument in favor of the Bill was delivered by Congressman Richards. It is submitted that the following brief excerpts of Congressman Richards' comments (delivered to the House on June 5, 1952) in support of the conference report are of particular interest:

"Mr. Richards. Mr. Speaker, the bill as reported by the conference represents what I consider a fair adjustment of the major differences between the two Houses. At the same time, I feel the conferees did a good job of retaining in the conference agreement the basic principles adopted by this House, while incorporating certain Senate provisions * * * "

* * * * * *

"We have kept in the reduction-of-personnel provision, except that the committee of conference changed the percentage to 5% * * *.

* * * * * *

"Several provisions adopted by this House are not retained in the agreement * * * ".

"There are other adjustments in the conference agreement, but the more important ones I have already outlined. I believe we now have before us a better bill than either the House or Senate version, better coordinated and better designed to enable the program to move ahead with a maximum of efficiency and a minimum of cost to the American taxpayers." (p. 6664)

Shortly after the foregoing remarks, Congressman Richards yielded the floor to Mr. Vorys, who made the following remarks:

"Mr. Vorys. Mr. Speaker, I signed this conference report and intend to vote for it. I was disappointed over a number of the decisions of the conferees. To be frank about it, I was disappointed earlier over some of the actions here in the House and in our committee on this bill but I realize that in legislation you cannot have it all your own way. Here we practice the art of the possible. This report is about as satisfactory as was possible, under all the circumstances.

"When I went into conference I felt mighty lonesome because, except for my colleague, the gentleman from Illinois (Mr. Chipperfield) and myself, every conferee had voted against every floor cut that had been effected in either body; and the score was, therefore, 8 to 2 . . .

"After about a half a day of skirmishing and bargaining we got around to this 50-50 formula on amount, splitting the difference between the House and Senate figures. The Senate operates in broad generalities and they had cut this bill not with a meat ax but with a buzz-saw, cut off a 15.2 per cent slab all the way through. In the House we had been selective and cut where we felt cuts ought to be applied. The conferees might have forced an overall distribution of the 50 per cent adjustment

> along the lines of the Senate bill. Instead, they applied the 50-50 formula selectively and split the difference on each item, so that we preserved the selective effect of the cuts that were made by the House. * * * " (p. 6665)

Within a matter of minutes thereafter, the Conference Report itself was "agreed to" by the House,[20] and it is apparent that the Conference Report is not only a substitute for House Report No. 1922, but it is also apparent that it contains nothing which in any way supports the construction which the majority decision below gives to the MSA proviso.

When the Conference Report was considered by the Senate (on June 9, 1952) support for the Report was managed by Senator Connally who made the following remarks pertinent to the present subject; and, for purposes of clarity italics have been added:—

> "Mr. Connally.
>
> * * * * * *
>
> "Mr. President, the committee of conference on the Mutual Security Act of 1952 met all day last Tuesday to resolve the difference between the House and Senate version of that bill. There were a number of differences between the two Houses, all of which were resolved after a careful examination of the issues. Before asking for approval of the conference report, *I want to tell the Senate of the more important issues we faced and the way in which they were met.*
>
> * * * * * *
>
> "Fourth. Reduction in personnel: The House version of the bill provided for a 10 per cent reduction in the number of United States citizens em-

[20] Ibid, at p. 6666 (June 5, 1952).

ployed pursuant to the appropriations authorized by this legislation as of January 1, 1952. *The Senate conferees agreed that some reduction of personnel was desirable,* but felt that there should not be a sharp reduction in personnel at a time when deliveries of military end items are beginning to arrive in Europe in increasing quantities and when the Technical Cooperation Program is just getting started in some countries.

"As a compromise, therefore, *we agreed to the House provision reducing personnel* in these programs *but changed the reduction figure to 5 per cent of the number* of employees on the payroll as of June 1, 1952. We adopted that date for its effectiveness, rather than a future date, in order to prevent the building up prior to the date of a large number of employees which we did not regard as necessary." (p. 6819)

The Senate "agreed to" the Conference Report on the same June 9, 1952.[21]

By reason of the foregoing it is respectfully submitted that it is entirely inappropriate to rely upon the excerpts quoted by the present majority opinion from the House Report No. 1922. It clearly appears that that report was supplanted by the Conference Report referred to above, and it further appears that the Senate was never at any time put on notice, directly or indirectly, of the suggestion that it was the purpose of the MSA proviso to authorize the heads of the three agencies concerned to dismiss honorably discharged veterans and other classified career civil service employees without regard to the rights which the Congress had for so many years insisted upon in their behalf.

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[21] Ibid, at page 6849.

The American Legion believes that the foregoing is a rather complete picture of the legislative history of the MSA proviso. The majority opinion of the Court of Appeals refers only to one of the five Committee Reports referred to above, and offers no explanation as to why or how the Report submitted to the House, upon which no action was taken (and later was superseded by a Conference Report which was approved by the House) should be considered as an authoritative expression of legislative intent.

We now come to a consideration of the Veterans' Preference Act, which the majority opinion of the Court below indicates has been struck down by the MSA proviso which we have just considered. It should be kept in mind that the MSA proviso became law on June 20, 1952, and the personnel action of which petitioner complained took place on September 17, 1952. In between these two dates (on July 14, 1952) the Congress amended Section 2 of the Veterans' Preference Act. The bill which effected that amendment was submitted to, and reported on, by the House Post Office and Civil Service Committee.[22] The report submitted on the bill which became law on July 14, 1952, (House Report No. 2338) is reprinted in full in 2 U.S. Congressional News, 1952, pages 2152-2154. This report includes the following statement:

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[22] As Appellant's brief pointed out to the Court below, the House Post Office and Civil Service Committee is a group which is traditionally entrusted by the House with the assignment of studying and recommending proposed legislation which affects veterans' preference rights in the civil service. The Committee in whose name House Report No. 1922 was issued—The House Foreign Affairs Committee—is not even supposed to be concerned with civil service legislation.

"It is the purpose of this legislation to extend the benefits of the Veterans' Preference Act of 1944 to persons serving in the Armed Forces of the United States after April 28, 1952 (the date of the signing of the Treaty terminating the state of war between the United States and the government of Japan) and prior to July 2, 1955, the date on which inductions under the Universal Military Training Act are terminated.

"Under the present Veterans' Preference Act veterans' preference for civil service purposes has been granted, among others, to those exservice men and women who have served on active duty in any branch of the Armed Forces of the United States during any war or during any campaign or expedition for which a campaign badge has been authorized.

"While hostilities during World War II ceased with VJ Day, a technical state of war existed until April 28, 1952. As a result, persons who entered the Armed Forces during actual hostilities and until April 28, 1952 were entitled to the benefits accorded to veterans under the Veterans' Preference Act of 1944.

"However, with the signing of the Peace Treaty with the government of Japan, only those servicemen actually in Korea, for which military operation a campaign badge is authorized, have veterans' preference for civil service purposes.

"The men presently inducted into the armed service are, of course, faced with many of the same situations as those who were inducted prior to April 28, 1952. They must involuntarily submit to a disruption in their professional careers or occupations, manner and place of living, and undergo rigorous training.

"Hearings were held by the Committee at which representatives of the Civil Service Commission

and the various veterans' organizations and employee organizations appeared. They were unanimously in favor of the bill.

"The Bureau of the Budget approved the bill but suggested an amendment which would exclude training for periods of such reserve training. It was conclusively shown that such an amendment was not necessary and if adopted, might place in question decisions during the past years made by the Civil Service Commission holding that reserve training was not active duty for the purposes of the Veterans' Preference Act."

The Court below was urged to recognize the rule announced by this Court in *U. S.* v. *Barnes* (Ky—1912) 22 U.S. 513, 529; 32 S. Ct. 117; 56 L. Ed. 291, where it stated:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands. * * * and it is the settled rule of decision in this Court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied to its enforcement, save as the contrary clearly appears."

As reference to House Report No. 1289, dated March 27, 1944 will disclose, the Veterans' Preference Act of 1944 was intended "to codify" laws respecting veterans' preference in the civil service. That statement, quoted from U.S. Code Congressional Service, 78th Congress, Second Session, at page 1154 reads as follows:

"GENERAL STATEMENT

"It has been the policy of the United States government since the beginning of the Republic to

extend certain benefits to those who have risked their lives in the armed services during wartime. Since shortly after the Civil War, the Congress has provided in various statutes for different forms of preference in governmental employment to war veterans. These statutes have usually been applied under Executive orders and regulations promulgated by the President.

"For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. * * *"

The foregoing is an expression of the Congress itself with reference to veterans' preference. In adopting this policy the United States merely followed governmental policy which has existed in every civilized nation since the time of the ancient Greek city-states and oriental empires. It is evident to anyone who studies the history of veterans' preference that it has been a changing concept, but it is also quite evident that there has never been the slightest indication on the part of the Congress that they ever intended to abandon this traditional principle in any manner or in any area.

Moreover, in amending Section 2 of the Veterans' Preference Act on July 14, 1952, Congress unquestionably manifested its continuing intent to extend this traditional benefit to veterans of the Armed Forces and, equally as important, Congress, at that time, acknowledged the valid existence of veterans' preference with respect to *all* civilian positions in *all* establishments, agencies, bureaus, administrations, projects, and departments of the government, whether permanent or

temporary; a circumstance quite opposite from that found in the majority opinion of the Court below.

The American Legion at this point invites attention to an interesting problem that would arise *if* the decision below were correct. This obversation does not concede that the said decision is correct, but it assumes that the two judges responsible therefor consider their judgment to be correct and lawful.

The problem arises thus:—the legislative history of the Act of July 14, 1952, (which, as pointed out above, was approved subsequent to the MSA proviso, and prior to Appellant's discharge) establishes beyond any reasonable doubt that the House Post Office and Civil Service Committee assumed, and by its assumption led the House to believe, that there had been no impairment of veterans' preference rights, and that none was contemplated. The Report manifests a clear intent to extend the Veterans' Preference Act to a new group of persons, and no one can reasonably conclude that the Committee itself, or the House, or the Senate, had the slightest suspicion that the Veterans' Preference Act was in any way to be effected by the MSA proviso which was still at that time pending before Congress.

It is equally apparent that by *expressly* amending the Veterans' Preference Act by the Act of July 14, 1952, the Congress makes it clear that the code of veterans' preference and civil service legislation is not to be amended, or deemed to be amended, except when the Congress itself expressly does so. If further proof of this proposition is desired it is found in 5 USC 2005 as enacted September 30, 1950 (c. 1123, Sec. 6, 64 Stat.); and, as Appellant's Brief points out, the Supreme Court takes an identical view in *United States*

v. *Barnes* (Ky—1912) 222 U.S. 513, 529; 32 S. Ct. 117; 56 L. Ed. 291 (quoted in Appellant's Brief on page 34).

The American Legion, therefore, submits that the judges responsible for the majority decision below, after reading the Act of July 14, 1952 (C. 728, 66 Stat. 626) and its legislative history, would be logically obliged to find that said Act impliedly repealed the interpretation which their decision gives to the MSA proviso.

It is to be remembered, in this connection, that Section 18 of the Veterans' Preference Act of 1944 (5 U.S.C. 867) expressly provides (in pertinent part) that "all acts and parts of acts inconsistent with provisions hereof are hereby modified to conform herewith . . ." Since the Congress took the trouble to specify that the Act of July 14, 1952 amended Section 2 of the Veterans' Preference Act of 1944, as amended, the full benefit of Section 18 was preserved, and by implication of the most obvious kind, the entire Section 2, as revitalized and extended (actually no revitalization was involved or necessary) by the amendment of July 14, 1952 is also entitled to the full benefit of Section 18, and consequently, it could be contended that the MSA proviso, as construed by the present decision, was (even before the Court below had an opportunity to make such a construction) expressly repealed by the enactment of the July 14, 1952 legislation. And, even if the MSA proviso of June 20, 1952 had said, as it did not, that the agency heads were to have "discretion" in deciding whom to discharge or retain, the present majority would be obligated to conclude (so long as it stands upon the present decision) that such grant of authority was annulled or impliedly repealed,

*pro tanto,* by the Act of July 14, 1952, or as suggested above, that it was repealed by virtue of Section 18.

## CONCLUSION

From the foregoing, and the Appellant's Petition, The American Legion believes that the importance of the question tendered to this Court is unquestionably apparent for several reasons.

The Court of Appeals had on one hand the Veterans' Preference Act of 1944, together with an understanding of its stature and legislative history. That Court was aware that the statute was a codification of traditional principles as old as the Country itself, and which have been a part of the statutory law of this Country for nearly a century. On the other hand, was the MSA proviso with its legislative history as set forth herein. The Court below, as Petitioner points out, held that the MSA proviso impliedly repealed veterans' preference. The decision was based upon the incomplete and improper legislative history of the MSA proviso, and in addition was contra to long established and well settled rules of law as laid down by this Court.

Of great importance is the impact of this decision upon future judicial consideration of the Veterans' Preference Act. The decision has already been cited as authority in similar cases in the District Court.[23] The Court below seems to believe, contrary to the views of this Court, that a statute must fall by implication if one can *find* a meaning for subsequent legislation which *seems* inconsistent, rather than searching for a compatible construction. The legal chaos which would result is all too apparent.

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[23] See Petition, note 4, page 7. Also Joyce v. Barnes, Civil Action 2077-54 in the District Court is affected by this decision.

Lastly, The American Legion respectfully reminds this Court that the rights upon which Petitioner relied and which the lower Court disdained are rights given to those who have fought to preserve this Nation. The importance of rights so purchased and the equal importance of their repeal can not seriously be questioned in this Court; for without the consideration for which those rights were granted, this Court might very well have no jurisdiction and the laws which it construes have no existence.

The American Legion urges that the Petition be granted.

Respectfully submitted,

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